Supreme Court, U.S.
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No. 94-498

In The

Supreme Court of the United States

October Term, 1994

SHERRY LINTZ; KEITH LINTZ, SR; BRIAN ALLEN JACOBS, a minor, by next friend Sherry Lintz; KEITH JAMES LINTZ, JR., a minor, by next friend Sherry Lintz; RICHELE NICOLE JACOBS, a minor, by next friend Sherry Lintz,

Petitioners,

versus

LINDA J. SKIPSKI and DEPARTMENT OF SOCIAL SERVICES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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A. Foster Children Have a Clearly Established Constitutional Right to be Free from Harm while in the Foster Care System after 1981, According to *Eugene D. v. Karman* and, Thus, Defendant's Reliance is Misplaced Because *Eugene D.* Applied Only to Time Periods Between 1974 and 1981.

Eugene D. v. Karman, 889 F.2d 701 (6th Cir. 1989) does not provide Defendants with immunity protection. The *Eugene* court concluded that although the right to protection from bodily harm in the foster care setting was not clearly established from 1974 to 1981, the case law "constitutionally imposed obligations from that time (1981) forward." *Id.* 889 F.2d at 708. In so holding, *Eugene* relied upon *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2nd Cir. 1981), which held children in foster care have a constitutional right to be free from physical harm while in foster care.

This factor in *Eugene* is fatal to Defendants' arguments that *Eugene* would bar Plaintiffs' claims as not being clearly established in the Sixth Circuit by 1987 when the children in this case entered foster care.

Eugene recognizes that *Youngberg v. Romeo*, 457 U.S. 307 (1982), "leaves no doubt that the substantive component of the Fourteenth Amendment's due process clause imposes certain obligations upon the state with respect to mental patients", but then inexplicably seems to disregard the *Youngberg* and *Estelle v. Gamble*, 429 U.S. 97 (1976), line of cases. *Eugene*, 889 F.2d at 710. Nevertheless, even with this flawed logic, the Court does recognize that by 1981, constitutional protection of children in foster care was clearly established in the Sixth Circuit.

Defendants' reliance on *Eugene D.* is, thus, misplaced and clearly does not provide Defendants with the immunity protection they seek.

Thus, the lower courts erred in concluding Plaintiffs were not entitled to constitutional protections during their entire tenure in foster care.

B. Material Facts in the Record Have Been Misrepresented by Defendants Which Highlight the Errors of the Lower Court in Accepting as True Material Facts Which Are in Dispute and to Which Plaintiffs Are Entitled the Inference.

Foster parent, Shirley Krause and alleged perpetrator Dale Krause testified that they were not given any safeguards or instructions when the children were returned to the foster home after Dale was confronted with allegations of sexual abuse on October 8. [R.82: Exhibit No. 5 at 70, 75; R.82: Exhibit No. 6 at 117] The lower court incorrectly accepted as true, Linda Skipski's claims that she had set up safeguards before returning the children to the home with the perpetrator. Defendants place great reliance on this claim denied by the foster parent and the perpetrator. The hostile confrontation which occured when the children were returned to the foster home strongly suggests that this claim is not true. [R.82: Exhibit No. 10:K. Krause Dep. pp 23, 24, 26 - 28, 46; R.82: Exhibit No. 6:D. Krause Dep. pp 62, 64, 65, 11].

The lower courts erred by accepting Skipski's version as true in the face of the Krauses' testimony and these other facts which justify an inference in favor of Plaintiffs. Skipski's failure to provide safeguards is indicative

of the indifference she exhibited to the minors. This indifference is magnified by Defendants' failure to follow any of the statutorily required reporting procedures. [R.82: Exhibit No. 7. *MCLA 722.623, et seq.*]. The matter was "dropped" by everyone although Skipski admitted in her deposition that the childrens' allegations constituted sexual abuse. [R.82: Exhibit No. 4: Skipski Dep. p. 60].

None of these abuse reports were being placed in the "official" record. Skipski continued to submit supplemental reports to the Court to support her effort at termination of the parental rights. [R.82: Exhibit No. 7A] She acknowledged in her October 19, 1990 notes that, when she advised the prosecuting attorney covering the Lintz case what had occurred, she was told (and knew) that she was supposed to call the police, but did not do so. [R.82: Exhibit No. 4: Skipski Dep. at 68; R.82: Exhibit No. 9: Dickson Dep. p.36]. She did not call protective services. [R.82: Exhibit No. 4: Skipski Dep. at 66]. She waited 11 days before she told the prosecutor even though the statute requires the reporting of abuse within 72 hours. The prosecutor, when told of the abuse, believed an investigation was in process and told Skipski to follow through with the police. [R.82: Exhibit No. 9: Dickson Dep. 25, 26, 41]. Skipski did nothing, and her gross indifference should not be rewarded with immunity protections.

This factual situation leads to the inescapable conclusion that Defendants' actions were indifferent to the needs and safety of these minors. As a result, Defendants are not entitled to immunity protections.

CONCLUSION

Foster children have a clearly established constitutional right to be free from physical harm while in the foster care system. These children were horribly abused over a long period of time, between 1987 and 1990. The lower court and the Court of Appeals have erred and made findings which are inconsistent with this court's teachings. The Court has the opportunity in this instance to provide clear directives to the circuits that the principles set forth in *Youngberg* and *Estelle* apply now and have applied since at least 1981 to children placed in foster care by the state, guaranteeing those children the protections set forth in the United States Constitution.

Respectfully submitted,

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